

August 27, 2020

VIA ELECTRONIC MAIL

Luly E. Massaro, Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

RE: Docket 3476 – Gas Service Quality Plan
Request for Relief from Penalty Because of Exogenous and/or Force Majeure Event

Dear Ms. Massaro:

On behalf of The Narragansett Electric Company d/b/a National Grid (“National Grid” or the “Company”), enclosed,¹ please see the Company’s Brief on the Definition of the term Exogenous Events for filing in the above-referenced docket.

On July 17, 2020, the Company submitted a request for relief from penalties assessed to it under its Gas Service Quality Plan (the “SQP”) for the first and second quarters of fiscal year 2020. After reviewing the Company’s request for relief, the Public Utilities Commission (“Commission”) instructed the Company to “... submit a legal brief with supporting citations addressing the term ‘exogenous event’ and how it should be defined for the purpose of evaluating performance under the Company’s service quality standards...” Enclosed, is the Company’s brief.

For the reasons set forth in the brief and based on the pre-filed direct testimony of Amy Smith dated July 17, 2020, National Grid respectfully requests that the Commission grant the Company’s requested relief from the penalties levied in the first and second quarters of fiscal year 2020.

Thank you for your attention to this filing. If you have any questions, please contact me at 401-784-4263.

Sincerely,



Andrew S. Marcaccio

Enclosure

cc: Docket 3476 Service List
Leo Wold, Esq.
Al Mancini, Division
John Bell, Division

¹ Per practice during the COVID-19 emergency period, the Company is providing PDF versions of the enclosures. The Company will provide the Commission Clerk with hard copies and, if needed, additional hard copies of the enclosures at a later date.

issues resulting from the roll out of the Gas Business Enablement program was the exogenous event that caused the penalty in the first quarter of fiscal year 2020, and (2) the Company showed that the penalty levied for the second quarter of fiscal year 2020 arose from an unusually high volume of leak calls during one hour on Christmas Day of 2019, which the Company could not respond to within the 45-minute standard, and which ultimately the Company determined to not be gas leaks. Accordingly, the Company identified these unusual situations beyond its control as exogenous events that warranted penalty relief.

In response, the PUC instructed the Company to submit a brief regarding the definition of exogenous event:

After review of the Narragansett Electric Company d/b/a National Grid's (National Grid) Request for Relief of Penalty in Docket No. 3476, the Commission is instructing National Grid to submit a legal brief with supporting citations addressing the term "exogenous event" and how it should be defined for the purpose of evaluating performance under the Company's service quality standards. The brief should not only focus on the factual claims of this case but should also recommend a definition that would be applicable to future cases. After National Grid's brief is submitted, the Division of Public Utilities and Carriers and any other party that has intervened will be given the opportunity to respond. National Grid's brief is due within fifteen (15) days, August 27, 2020.

The Company now submits this brief in response to the PUC's directive.

III. Definition of Exogenous Event

A. Proposed Definition

The Company proposes that this Commission define "exogenous event" in this context as an event that is outside National Grid's control and could not be avoided by National Grid's reasonable exercise of care.

B. *Force Majeure* and Exogenous Events

In support of this definition, the Company directs the PUC to the dictionary definition of the term exogenous. *See e.g. Bliss Mine Rd. Condo. Ass'n v. Nationwide Prop. & Cas. Ins. Co.*, 11 A.3d 1078, 1084 (R.I. 2010)(“We often have looked to dictionary definitions when determining a word’s ordinary meaning.”) (citing *Chambers v. Ormiston*, 935 A.2d 956, 962 (R.I.2007)). Merriam-Webster defines exogenous as “caused by factors . . . or an agent. . . from outside the organism or system.”¹ This plain dictionary meaning aligns with the Company’s proposed definition.

National Grid’s proposed definition also comports with the use of the term in other utility regulatory contexts.² Significantly, when a utility seeks relief from a penalty by demonstrating the occurrence of an exogenous event, as here, exogenous event is defined broadly, and usually in relation to a *force majeure* event.

For instance, the Maine Public Utilities Commission, in holding that it would allow consideration of “any and all circumstances related to [public utility provider’s] failure to meet one or more service quality benchmarks,” including consideration of exogenous events, likened exogenous events to *force majeure*. *Maine Pub. Utilities Comm’n Provider of Last Resort (Polr) Serv. Quality Indicators & Standards (Chapter 201)*, No. 2012-00401, 2012 WL 6130885 (Nov. 21, 2012)(“we note that allowance for consideration of ‘exogenous’ events, also referred to as Force Majeure. . .”). The Commission there declined to adopt a specific definition for exogenous events, but rather stated that the utility providers “will have the opportunity to provide information regarding possible exogenous events. . . .” *Id.*

¹ <https://www.merriam-webster.com/dictionary/exogenous>

² Typically, the term “exogenous event” is used in decisions related to a *rate change*, rather than relief from a penalty. Those decisions are discussed in the following section.

The New Hampshire Public Utilities Commission also has used the two terms in this context. *See Consol. Commc'ns Holdings, Inc.*, No. 26,022, 2017 WL 2418723, at *15 (May 31, 2017)(“In the event of **a force majeure or other exogenous circumstance**, the Merged Company may petition the Commission to reduce the additional amounts owed . . .”)(emphasis added). The PUC also has drawn the comparison in a previous Order in this docket. *See In Re: The Narragansett Elec. Co. d/b/a/ Nat'l Grids Gas Serv. Quality Plan Request for Waiver of Penalty*, No. 3476, 2019 WL 1299489, at *1 (Feb. 22, 2019)(construing National Grid’s previous request for relief from penalty as the result of “an **exogenous and/or force majeure** event.”).

Here, the PUC order under which National Grid seeks relief from penalty (Order No. 17605), states in relevant part: “[i]f NEGas contends that an **exogenous event or a force majeure** occurred, it must seek relief from the Commission. . . .”(*Id.* at p. 36)(emphasis added).³

Force majeure is also not defined in the Order. It is, however, used and defined in various state regulations. The Rhode Island Division of Taxation has defined *force majeure* as “an event which is 1. reasonably unforeseen, 2. outside the control of the Applicant and 3. could not be avoided by the Applicant's exercise of due care.” 280-RICR-20-20-6.5. Similarly, the Rhode Island Department of Administration has defined *force majeure* as “a cause not reasonably foreseen by, beyond the control of, and without the fault or negligence of the party declaring a force majeure event. . . .” 220-RICR-30-00-13.23

³ As evidenced by the language of the Maine and New Hampshire decisions, a *force majeure* is generally considered a type of exogenous event. Where the term *force majeure* is not used, the parties often stipulate to *specific* events as being deemed “exogenous,” as discussed in the following section. *See e.g. Pub. Serv. Co. of New Hampshire*, 96 N.H.P.U.C. 348 (June 23, 2011)(The New Hampshire Public Utilities Commission accepted a public utility company’s filing of a Certification of Exogenous Events find that (1) termination of a Medicare subsidy credit; and (2) bonus tax depreciation were exogenous events that justified an annual increase in the company’s distribution rates of \$2.93 million.).

Applying this *force majeure*-like standard, the PUC previously has granted National Grid relief from a penalty imposed because of National Grid's performance for an On-Cycle Meter Read based on a severe wind and rainstorm that occurred in October 2017. *In Re: The Narragansett Elec. Co. d/b/a/ Nat'l Grids Gas Serv. Quality Plan Request for Waiver of Penalty*, No. 3476, 2019 WL 1299489, at *1 (Feb. 22, 2019). The storm had forced National Grid to reassign meter personnel to provide emergency wires down support. The PUC agreed with the Rhode Island Division of Public Utilities and Carriers' recommendation that the penalty should be waived as an exogenous or force majeure event, and that it would not make sense to "penalize [National Grid] for focusing on public safety" by reassigning personnel. *Id.* at *5.

In the SQP, as in other contexts discussed herein, the term exogenous event is used in addition to the term *force majeure*. Accordingly, rules of construction dictate that exogenous event should be given meaning that is in addition to events that would be classified as *force majeure*. See e.g. *Bldg. Sys., Inc. v. Town of Lincoln Zoning Bd. of Review*, No. C.A. PC 99-3437, 2000 WL 1273997, at *5 (R.I. Super. Aug. 8, 2000) ("It is a well-established rule of statutory construction that this subpart must mean something different from, or in addition to the other subparts."). Thus, even if a definition of *force majeure* might not include certain categories or types of events, exogenous event is a broader term that justifies a broader application to a greater scope of events in the context of the SQP, which is consistent with the Company's proposed definition.

C. Exogenous Events in the Context of Rate Changes

Though distinct from the present context, state public utility decisions that construe the phrase "exogenous event" in the context of rate changes are a useful comparison, as they generally adopt a more limited definition of the phrase, while keeping the same general

themes. Usually, in these circumstances, regulators have identified and defined specific categories of events as exogenous events that would justify a particular type of rate relief or adjustment. The types of events specifically defined as exogenous in these circumstances fit neatly within the Company's proposed definition – as they are events outside the utility's control that could not have been avoided by the reasonable exercise of care.

For instance, the Pennsylvania Public Utility Commission agreed with an Administrative Law Judge's determination that "the number and kind of exogenous events that can legitimately trigger a request for additional revenues would be very limited." *In Re Frontier Companies*, 86 Pa. P.U.C. 502 (Dec. 6, 1996). *See also In Re: Narragansett Electric Company Comprehensive Distribution Rate Settlement*, Docket No. 3617, Report and Order, pp. 3-4 (Nov. 9, 2004)⁴ (defining exogenous events for purposes of justifying freezing the distribution component of Narragansett Electric Company's rates as either a "state initiated cost change"; "federally initiated cost change"; "regulatory cost reallocation"; or "excessive inflation."). Notably, the listed events were categorized as "kind[s] of exogenous events" – not an exhaustive list of what would constitute an exogenous event.

The New Hampshire Public Utilities Commission has held that federal and state corporate tax reductions in 2018 were an "exogenous event" within the meaning of the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement, justifying a rate adjustment for Eversource. *Pub. Serv. Co. of New Hampshire d/b/a Eversource Energy*, No. 26,177, 2018 WL 4759501, at *1 (Sept. 27, 2018). Notably, the Commission's decision was unaffected by the fact that the 2018 tax changes were foreseeable. *Id.* at *5.

⁴ [http://www.ripuc.ri.gov/eventsactions/docket/3617-NECOrd18037\(11.9.04\).pdf](http://www.ripuc.ri.gov/eventsactions/docket/3617-NECOrd18037(11.9.04).pdf)

Regardless of the fact that definitions of exogenous events in the context of rate changes are more limited and often specifically enumerated, they all include the element of being outside of the claiming party's control. *See In Re S. Connecticut Gas Co.*, 238 P.U.R.4th 260 (Oct. 27, 2004)(“Exogenous costs resulted from “events that were unanticipated and outside [the company's] control. . . .”); *In Re Alltel Pennsylvania, Inc.*, No. P-00981423, 2000 WL 33300689 (Dec. 21, 2000)(adopting a definition of exogenous events that specifically excluded events outside of the utility company's control); *In Re Frontier Companies*, 86 Pa. P.U.C. 502 (Dec. 6, 1996)(describing exogenous events as ones that “generically involve unforeseen regulatory or other governmental developments which have impact on a public utility's expenses, income and profits, beyond those normally contemplated under any price cap system.”).

IV. National Grid Properly Seeks Relief from the Levied Penalties and the PUC Should Adopt its Proposed Definition of Exogenous Events.

Based on the definition proposed above, the Company's Request appropriately seeks relief from penalties levied due to exogenous events that were out of the Company's control and could not be avoided by its exercise of appropriate care.

The first exogenous event for which the Company seeks penalty relief is the impact of issues that arose during the Gas Business Enablement (GBE) rollout, which caused the Company's performance to fall below the benchmark for Leak Call Responsiveness for the first quarter of 2019. (Testimony of Amy Smith, at 7). The issues that occurred during the GBE rollout were not within National Grid's control and occurred despite the Company's exercise of appropriate care. (*Id.* at 9). The Company's July and August performance for Leak-Call Response during Normal Business Hours fell slightly below the penalty threshold for this metric as a result of the issues identified during the GBE rollout. The GBE rollout involved a new

system and a change in business processes that resulted in unexpectedly longer dispatch times for emergencies. For example, the new system changed the Company's processes for assigning technicians to respond to leak calls, which caused some inefficiencies in getting the assignment to the technician best equipped and prepared to respond. Additionally, the Company experienced some issues with adoption of the new system as part of the implementation and training process, which contributed to some delays. Collectively, these issues caused the Company to temporarily miss the 30-minute goal for Leak Response During Normal Business Hours. The Company had consistently met this metric in the months prior to the GBE rollout. Although the Company took care to plan and prepare for as many potential contingencies as it could leading up to the GBE rollout, it could not have reasonably anticipated every issue that would arise. The Company did not anticipate these particular issues, which unexpectedly impacted the Company's ability to respond to leak calls within 30 minutes.⁵

The Company also exercised appropriate care to prepare for and remedy the issues with the new system. The Company spent significant time planning and preparing for the GBE rollout in advance. And once the new system rolled out and issues began to arise, the Company put in place work-arounds, scheduled additional staff, and asked staff to work overtime so that it could meet the 30-minute response time goal. These responses were evident in that the Company's improved performance in the final month of the first quarter and in subsequent quarters once the Company's experience with the GBE system matured.⁶

⁵ The Company submits that the issues associated with the GBE rollout were unforeseeable in the first quarter only as the rollout coincided directly with the Company's July and August 2019 performance. The Company incurred additional penalties for delays Leak Call Responsiveness in the second quarter of 2020, but does not seek mitigation of that penalty because by that point, the issues were no longer unforeseeable.

⁶ The Company's third and fourth quarter performance met or exceeded the benchmark. *See* the Company's Third Quarter Report – FY 2020, Attachment 1, Page 1, Column 4, which was filed on April 30, 2020; *See also* Fiscal Year 2020 Annual Report on Service Quality Plan (Gas Operations), dated August 3, 2020.

The second exogenous event for which the Company seeks partial penalty relief is a series of twelve gas odor calls in one hour on Christmas Day 2019, which resulted in a penalty for the second quarter. The twelve calls occurred within one hour, and on a company holiday. (*Id.* at 10). Seven of these calls (referred to in Amy Smith’s testimony as the “Christmas Day Event”) came from the same concentrated area of East Providence, and the resulting investigation identified no leaks. The Company did not find any clear indication as to the source of the alleged odor. (*Id.*). As a result of the Christmas Day Event tying up its employees, the Company was unable to respond to nine calls within the allotted 45-minutes, for which it received a penalty. (*Id.* at 10-11). The Christmas Day Event was clearly an exogenous event within the meaning of Order No. 17605 because the gas order calls the Company received, which turned out to relate to no leak at all, were entirely outside of its control. Moreover, the volume of calls (twelve in one hour) was significantly higher than the Company’s average of 1 to 2.4 calls per hour. (*Id.* at 12). Therefore, the Company could not reasonably be expected to have staff ready to respond to that unusually high call volume, which was nearly six times its average hourly call volume, and which occurred on a holiday. The Company exercised appropriate care in responding to and investigating all of those calls as quickly as possible.

Like the October 2017 storm, *see* 2019 WL 1299489, at *1 (Feb. 22, 2019), both the GBE rollout and Christmas Day Event were outside National Grid’s control, unforeseeable and could not have been avoided despite the Company’s exercise of appropriate care.

Additionally, the PUC can easily apply the Company’s proposed definition of exogenous event in future matters concerning the SQP. It presents a two-prong inquiry: (1) was the event that caused the SQP penalty outside the Company’s control; and (2) could the Company have avoided the impact of the event if it had reasonably exercised care. By adopting this definition,

the PUC also would establish a framework for the Company to submit filings that meet its burden of proof in the event of future penalties that it asserts resulted from exogenous events.

V. Conclusion

For these reasons, National Grid respectfully requests that the PUC adopt the Company's proposed definition of exogenous events under the SQP and Order No. 17605 and grant National Grid's requested relief from the penalties levied in the first and second quarters of fiscal year 2020.

Certificate of Service

I hereby certify that a copy of the cover letter and any materials accompanying this certificate was electronically transmitted to the individuals listed below.



Joanne M. Scanlon

August 27, 2020
Date

**Docket No. 3476 – National Grid Gas - Service Quality Plan
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